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The "Monster That We Need to Slay"?

Global Governance, the United States, and the International Criminal Court

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The International Criminal Court is a new mechanism for the global governance of human rights that enjoys broad support from a large number of states. The United States expressed its hostile opposition especially in the early years, claiming that the ICC was harmful to US national interests. This attitude toward the court changed over the years, and a more pragmatic approach toward the ICC is now discernible. The United States had to acknowledge actions taken in opposition to the ICC started to be harmful to its own national interests and it also realised the national-interest utility the court has despite the deep-seated opposition to the concept of supranational sovereignty. This article looks at the reasons for US opposition, its initial hostile position, and changes in the US approach towards the ICC.

KEYWORDS: International Criminal Court, global governance, US opposition, international criminal justice, human rights.

Heated outburst in the US Senate in 1998, just after the end of the Rome Conference, set the tone for the US position toward the International Criminal Court (ICC). Senator Rod Grams called it "dangerous" and a "monster" that needed to be slayed, and Senator Jesse Helms predicted that "as long as there is a breath in me, the United States will never—and I repeat never, never—allow its national security decisions to be judged by an international criminal court."[1]

Before negotiations for the ICC started in 1998, Congress had expressed general support for a permanent court in principle, arguing that such a court would "serve the interests of the United States and the world community" and that "the United States delegation should make every effort to advance this proposal at the United Nations."[2] This support started to diminish, however, when the ICC came closer to reality during the negotiations in Rome and the US could not include the safeguards it wanted to achieve. The US under the Bush administration engaged in a number of hostile actions with the aim to exempt US citizens from the court. More recently, however, there have been signs that such open hostility is fading and that the United States is starting to engage with the court it could not prevent from being established.

This article analyzes the ICC as an instrument of global governance of human rights and the US response to it. The US position towards the ICC is important because the court depends on its member states and would benefit from the support of

the remaining superpower in order to be strengthened and be able to operate more effectively.

This article starts by looking at the main reasons why the United States claims that the court is not in its national interest. It then charts actions taken in opposition to the ICC and also more recent changes in US attitudes toward the court. The article concludes that the US started to engage with the court because it could no longer afford to ignore an international institution that has 111 member states, including some vital US allies, and that the opposition is harmful to its national interests—the very issue it wanted to protect in the first place.

Creation of the ICC

The ICC was created in 1998 during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (known as the Rome Conference) that took place in Rome from 15 June to 17 July. Nearly 160 states met to negotiate a "final act" for the proposed ICC. The negotiations were very complex, and by the end of the conference some of the key issues were still not resolved to everyone's satisfaction. However, a "package deal" was put to the vote on 17 July 1998 with 120 states voting in favor, 7 against (including the US), and 21 abstaining.[3] The ICC came into being on 1 July 2002, six months after the sixtieth state ratified the court's Statute into its national laws.

The ICC is a permanent and independent court that has jurisdiction over war crimes, crimes against humanity, and genocide.[4] The ICC constitutes a step away from the classic regime of state sovereignty toward integrating a broader framework of global governance to enforce international human rights and administer international criminal justice. The court's Statute includes a number of compromises that were necessary to preserve the fundamental principle of state sovereignty but at the same time ensure that a functioning global mechanism for enforcing existing human rights laws could be created. One such compromise is the principle of complementarity which means that the court complements national jurisdiction and can only act if the state in question is genuinely unable or unwilling to investigate or prosecute itself. This places the primary responsibility for investigation and prosecution on national authorities. The principle of complementarity aims to strengthen rather than replace national courts in matters of enforcing international

laws by reinforcing states' existing obligations. Yet, it also fills a gap when states either cannot or will not act to ensure the global enforcement of human rights. The principle thereby preserves state sovereignty in two respects: states can be sure of non-interference in their internal affairs if they act in accordance with their obligations, and they also continue to have primary responsibility toward their own people to enforce existing international legal obligations themselves. Achieving such a compromise was possible because the notion of sovereignty changed over the years to not only include rights for states but also obligations toward a state's own citizens.[5] It can be argued that "there is a widening consensus that the protection of human rights is a matter of collective international concern and a legitimate object of foreign policy."[6] The main problem remains, however, that even though states sign up to a large number of international laws to protect human rights, the laws' enforcement is still dependent on voluntary state cooperation.

The United States and the ICC

The ICC enjoys broad support from a large number of states, but the United States has so far refused to join the court. This opposition is out of line with US historic support for international criminal courts based on liberal values of human rights and the rule of law. The US played a leading role in the Nuremberg trials and in the creation in 1994 of the UN *ad hoc* courts for the Former Yugoslavia and Rwanda. Even though the US engaged actively at the Rome Conference and subsequent meetings, it always maintained that acceptable protection measures had to be built into the Statute and was not satisfied with the compromises reached in Rome.

The US position shifted with different administrations: the Clinton administration remained cautiously engaged with the court demonstrating general support for the idea of a permanent international court. The Bush administration, in contrast, took a number of actions to undermine the court, based on a unilateralist focus on national interests and national law enforcement. This initial hostility changed to a more pragmatic approach when the United States recognized that these actions could not stop the ICC from coming into being and were actually harmful to US interests. In mid-2010, the Obama administration is still reviewing its official policy regarding the ICC but has already stated that it will end US hostility toward the court and continue to cooperate in the investigation currently taking place in Darfur, Sudan.

Changes in the American stance towards the ICC reflect differences of what is considered by the respective administrations to constitute the 'national interest' and whether the ICC can be used as a tool to further it. In particular, the Bush administration acted from a realist position of focussing on national interests rather than collective values of a liberal order beneficial to the international community as a whole. State interests are not a static given but change over time and adjust to changing circumstances. "Rather, national interests are intersubjective understandings about what it takes to advance power, influence and wealth, that survive the political process, given the distribution of power and knowledge in a society."[7] Looking at changes of the US position through such a constructivist lens will help understand how national interests are created and how they influence policy making[8] as a way of understanding the evolution of the US position over time.

Issues of Opposition

US opposition to the ICC focuses on two main areas: the court's jurisdiction as set out in Article 12, and a criticism that the ICC is independent from the UN Security Council and does not recognize the "special" role the United States plays as a major superpower in international relations.

Article 12 and the ICC's Jurisdiction

The United States opposes Article 12 of the Statute, which gives the ICC jurisdiction if the offense is committed on a state party's territory or if the accused is a national of an ICC member state. This means that—at least in theory—the ICC could exercise jurisdiction over US nationals if they were accused of committing an ICC crime on a state party's territory, *without* the need for US consent.[9] The United States argues that this would in effect give the ICC—as an international institution—universal jurisdiction, which is not part of customary international law.[10] This view is controversial and rejected by international lawyers "on the simple basis that while a non-party *state* is not itself bound to accept an assertion of jurisdiction over itself unless it has consented, the same is not true of its *nationals* if they commit offenses in the territory of a state that is a party."[11] Individuals are subject to states' territorial jurisdictions, which includes the possibility of extradition to an international court.

The fact that the ICC can exercise jurisdiction over third parties without a need for *additional* express consent is part of the court's fundamental set-up: it

empowers the court to investigate and prosecute individuals for the most serious crimes that are already established in international law, independent from states. The United States agreed to such provisions in other treaties, such as the Torture Convention, which allows (and even requires) prosecution or extradition of alleged criminals regardless of their nationality. The ICC is based on precedents set by such conventions and also the *ad hoc* courts, which similarly do not require express state consent. Given that they enjoy US support, it is evident "that there is no objection in principle to the idea of international courts"[12] but that the objection is only related to an international court exercising criminal jurisdiction over Americans.

The crimes in the ICC's Statute are already established in international treaties and conventions and the Statute therefore does not create new laws[13]; it establishes a new collective enforcement mechanism for already accepted universal norms.[14] This means that "the failure of the US to become a party to the ICC does not exempt its citizens from the universality already established."[15] Even though the ICC draws most immediately from territorial and national jurisdiction, it receives added support from the increasingly important notion of universal jurisdiction. This is the point where the ICC adds to existing provisions and where it seeks to fill a gap: it constitutes a global enforcement mechanism for universal values aimed to be largely independent from states.

Great Power Responsibility and the Security Council Veto

The United States claims that even though it supports the overall aims of the ICC, it is concerned that the ICC could threaten the independence and flexibility of US military forces. Some argue that the US – as only remaining superpower - should be given special protection and that the ICC "fails to recognize [the US'] unique responsibilities in the world when issues of international peace and security are involved."[16] Others, however, point out that even though the United States does have unique responsibilities as a great power, "when it claims to act for the common good of international society . . . it also has a democratic duty to be accountable to international society for the way it fulfils those responsibilities."[17] The United States is accountable for its actions to the international community in whose name it claims to act, which also means that it cannot impose double standards, exempting its own citizens from acting in accordance with justice norms others have to adhere to.

The ICC is independent from the UN, which is a major concern for the United States because it cannot fully control the ICC through its powers in the Security Council. The Security Council can refer a situation[18] to the ICC prosecutor when acting under Chapter VII of the UN Charter, which makes the establishment of any further *ad hoc* tribunals unnecessary. This gives the Security Council the power to still be able to intervene judicially in a situation it deems a threat to peace and security by making use of the ICC as a standing court.

More controversially, however, the Security Council does not have the power to halt proceedings taking place before the ICC. Article 16 of the Statute sets out that the Security Council can defer (but not terminate) an investigation or prosecution for a period of twelve months (with the possibility of renewal). To do this, the Council cannot simply veto ICC action but has to adopt a declaration to postpone proceedings, which requires a minimum of nine affirmative votes. By having to vote in favor of deferring ICC action, the possibility of unilateral veto against the ICC by any one of the Security Council's permanent members is removed.

Article 16 represents a significant development integrated into the Statute because it means that no one state (including the five permanent members of the Security Council) can unilaterally control ICC proceedings. The role of the Security Council in maintaining peace and security is still integrated in the Statute (by having the power to refer cases and suspend proceedings if deemed necessary), but the Council is awarded only limited powers. This removal of direct Security Council control over the court is an "innovative aspect"[19] of the Statute, necessary to make it possible for the ICC to function independently from the UN as a political body. This compromise was important because of the different natures of the two institutions: the UN is a state-centred institution, primarily concerned with protecting the inviolability of state sovereignty, whereas the ICC aims to enforce justice for individuals universally, independent from different states' national interests.

The United States has criticized this lack of Security Council control because it argues that US soldiers are required in a large number of UN missions to restore or maintain peace and security, which makes them uniquely vulnerable to possible ICC jurisdiction. Other permanent members of the Security Council, such as the UK and France (and to a degree Russia, which at least signed the treaty), however, that also commit peacekeeping forces to UN missions were satisfied with existing safeguards incorporated into the Statute. This begs the question, Why were they not sufficient for

the United States? The answer might lie in the fact that even though the ICC was created to work alongside the UN and not to undermine it, it also attempted to do indirectly what could not be done directly; namely, to reform the UN by removing direct Security Council control. This challenge to the Security Council can be seen on the one hand as a reason for the US opposition, but on the other as a cause for the enthusiasm and support of such a large number of states that support the idea of equal treatment.[20] As Samantha Power argues: "Many deem the Security Council as the epitome of a politically motivated institution and want an independent ICC precisely because they believe it will not be driven strictly by great power politics."[21]

Staying Engaged—Clinton's Signing of the Treaty

The US did not vote in favour of the ICC in Rome which was mainly down to the fact that the US could not fully control ICC actions in case they went against possible US interests. This meant that the US attempted to "maintain great power hegemony over international justice."[22] Despite the opposition to the Statute as it emerged from the Rome Conference in 1998, the US delegation continued to engage in the Preparatory Commission meetings that followed, which aimed at negotiating further details of the Statute, such as elements of crimes and the rules of procedure and evidence. David Scheffer, then US ambassador at large for War Crimes Issues and head of the US delegation, believed that enough progress had been made in the negotiations after Rome to reconsider the US position on whether to sign the Statute. He was convinced that the US delegation had achieved "the most that pragmatically could be achieved in light of all that we confronted, both internally and externally: a sophisticated matrix of safeguards that provided a high degree of protection for US interests and . . . additional safeguards that would achieve the best possible relationship for the United States with the ICC."[23] He argued that some compromises were necessary to achieve a greater good of enforcing universal norms globally, and he also believed that the United States could gain from membership to the court.

There were a lot of divisions within the administration and opposition at the Senate. [24] Senator Jesse Helms, then Chair of the Senate Foreign Relations Committee, argued that the Court would be 'dead-on-arrival' in Senate, if the treaty did not include United States' veto powers over which cases were brought before it.[25] "The Senate's opposition to the Court was based on the perception that the Court

unduly threatened US sovereignty and its military personnel stationed overseas. … such opposition to the Court represents an electoral logic or political reality in which realist concerns now reproduce domestic political outcomes that are not favorable to international human rights norms."[26] Despite this domestic opposition, Scheffer was still convinced that signing the Statute was beneficial for the US in order be able "to negotiate further Treaty-friendly proposals and thus protect American interests while pursuing international justice."[27] In line with a constructivist approach of evolving national interests, he emphasised the possible utility of the ICC for US interests and being able to use the court whenever necessary.

On 31 December 2000, the last possible day for signature, President Bill Clinton decided to sign the Statute and expressed US "strong support for international accountability and for bringing to justice perpetrators of genocide, war crimes, and crimes against humanity."[28] He argued that the United States signed the treaty in order to "remain engaged in making the ICC an instrument of impartial and effective justice in the years to come" and to sustain the tradition of US "moral leadership" in its commitment to individual accountability. Yet, Clinton also made clear that the United States was still not satisfied with the Rome Statute in its present form and that "in signing, however, we are not abandoning our concerns about significant flaws in the treaty." He acknowledged existing domestic opposition and did "not recommend my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." He concluded that the ICC could make a "profound contribution in deterring egregious human rights abuses worldwide" and that by signing, the United States wanted to continue to engage in discussion with other governments in order to advance these goals. Clinton recognised that it was in the US national interested to stay engaged with the ICC and be able to take part in future negotiations. His administration supported the broader goals of the court and hoped that US involvement would eventually lead to changes in the Statute more in line with US interests.

Hostile Opposition—Bush's 'Un-signing' of the Treaty

The Bush administration did not take a favorable approach to the ICC from the start and did not engage constructively in the Preparatory Commission meetings once it took over from its predecessor in 2001. John Bolton, Under Secretary for Arms

Control and International Security in the Bush Administration, argued that "America's posture toward the ICC should be "Three Noes": no financial support, directly or indirectly; no cooperation; and no further negotiations with other governments to "improve" the ICC."[29] Scheffer criticised the "short-sighted and anaemic approach"[30] of the administration and believed that it resulted in forfeiting opportunities his delegation had initiated in preceding meetings.

On 6 May 2002, President George W. Bush decided to formally withdraw from the Rome treaty and to effectively "un-sign" it.[31] Bolton issued a letter to the UN that the United States did not want to become part of the ICC and therefore did not have any legal obligations toward the court arising from Clinton's signature. Bolton, probably the most vocal opponent to the ICC during the Bush administration, once described the ICC as "a product of fuzzy-minded romanticism [that] is not just naive, but dangerous,"[32] maintained that the ICC was "a stealth approach to eroding our constitutionalism and undermining the independence and flexibility that our military forces need to defend our interests around the world."[33]

The move to un-sign the treaty was in line with a general shift of the Bush administration's attitude away from multilateralism: "rather than unveiling new initiatives, the focus of Bush's foreign policy during his first eight months in office was on extracting the United States from existing ones."[34] In line with a realist approach towards foreign policy, the Bush administration put a stronger focus on national interests and unilateral action. As Secretary of State Condoleezza Rice already set out in 2000, the administration's foreign policy would "proceed from the firm ground of the national interest, not from the interests of an illusory international community."[35]

This position intensified further after September 11, 2001. The National Security Strategy of 2002 set out an agenda for possible unilateral and pre-emptive action in the pursuit of national security that also involved new interpretations of international law to justify such conduct. Public support for Bush's policies increased, and Congress authorized him to "use all necessary and appropriate force" in the "war on terror," giving the president almost unchecked powers to make foreign policy decisions. This move "partly reflected the enormity of the [September 11] attacks and a principled belief that crises require lawmakers to accede to strong presidential leadership. But Congress's deference also reflected the Democratic Party's weakness on foreign and defense policy. . . . Worried that their criticisms would at best not be

credible with the American people and at worst might sound unpatriotic, most Democratic lawmakers who would have preferred to criticize the White House opted for silence."[36]

Un-signing the ICC Statute underlined the US state-centred and unilateralist view that realizing justice for victims of serious human rights abuses was part of individual states' sovereignty and not an issue for global governance (i.e., an international institution intervening in internal affairs). The Bush administration's realist approach towards international relations emphasised the importance of state sovereignty and national interests that questioned the utility of international institutions in general. As Undersecretary for Political Affairs, Marc Grossman argued that, "states, not international institutions are primarily responsible for ensuring justice in the international system."[37] However, by withdrawing from the treaty, the United States also lost any form of control it might have had otherwise in shaping the ICC and its workings and also the possibility of using the ICC for their own interests. This raised concerns for US officials and might be a reason why—after the initial hostile and active opposition—the Bush administration had to change its approach toward the ICC in more recent years.

Un-signing the treaty was condemned by a number of different groups. Several members of Congress sent a letter to President Bush in which they objected that this action "has damaged the moral credibility of the United States and serves as a US repudiation of the notion that war criminals and perpetrators of genocide should be brought to justice."[38] They argued that the United States had the same values as those intended by the ICC and that rejecting the institution "now places the United States in the company of notorious human rights abusers like Iraq, North Korea, China, Cuba, Libya, and Burma." The EU also formally issued a declaration on behalf of its member states criticizing the US position and stating its "disappointment and regret."[39] It argued that the EU respected the sovereign right of the United States not to sign the treaty but also believed that "this unilateral action may have undesirable consequences on multilateral treaty-making and generally on the rule of law in international relations."

US Actions in Opposition the ICC

Since the United States could not prevent the ICC from coming into force, it undertook a number of actions to undermine the workings of the court and to exempt US nationals from its reach.

UN Resolutions

In 2002, the United States vetoed the extension of the UN peacekeeping mission to Bosnia and Herzegovina and also threatened to withdraw all of its other UN peacekeeping forces because it claimed that US soldiers were at risk of possible ICC jurisdiction on that territory. Justifying this action, the US ambassador to the UN, John Negroponte, argued that even though it was unfortunate that the United States had to veto the extension of the mission, it was not prepared to ask its peacekeepers "to accept the additional risk of politicized prosecutions before a court whose jurisdiction over our people the Government of the United States does not accept."[40] He maintained that the United States was still committed to contributing to UN peacekeeping missions but that a compromise to solve this problem needed to be found. The United States proposed complete immunity for UN peacekeepers by adopting a resolution in line with Article 16 of the Statute with the prospect of renewing it after twelve months.

Despite criticisms expressed by a number of states (most of which were not allowed to vote), Resolution 1422 was adopted unanimously by the members of the Security Council, exempting peacekeeping personnel from the ICC's jurisdiction for a period of twelve months. The resolution was renewed for another twelve months in 2003.[41]

In May 2004, the United States sought to renew Resolution 1422 for a second time, but it faced stiff opposition from a number of states and eventually decided to withdraw the request. One major argument of the opposition was the growing concern about revelations of abuse against prisoners at Abu Ghraib prison in Iraq by US troops. Kofi Annan believed that requesting an exemption for the United States in this situation would seem hypocritical and would impose double standards because the United States was accused of having violated universal standards of justice in the way it treated Iraqi prisoners.[42] US officials interpreted the situation to the contrary, arguing that Abu Ghraib proved that "the United States does stand for justice and will itself impose justice on any members of our services who might undertake things that

constitute international crimes. . . . But it's a matter for us to take care of and not for some court with some jurisdiction that we're not party to."[43] The United States thereby emphasised that even though it proclaimed to be committed to protecting and enforcing justice norms, this could only be achieved through national courts without external intervention. However, Colin Powell admitted that Abu Ghraib had affected the way people looked at the ICC and conceded that it was less likely the United States would be able to achieve another renewal of the resolution under these circumstances.[44] The United States eventually decided to withdraw its request, arguing that it did not want to engage the Security Council in a "prolonged and divisive debate."[45]

This reversal of strict opposition to the ICC is evidence of a constructivist approach towards foreign policy making whereby foreign policy is what elites can make of it in a given context. The US still acted from the premise of its national interests, but these are an ongoing process of practice and interaction and therefore change over time. The US was forced to change its position given the circumstances and had to adjust its policy accordingly. However, it still emphasised the importance of its own interests and therefore issued a statement to the UN in which it argued that failure to renew the resolution would mean that the United States "will need to take into account the risk of ICC review when determining contributions to UN authorized or established operations."[46] A few days later, the Defense Department announced that it would withdraw personnel from peacekeeping missions in Ethiopia and Eritrea and also Kosovo because they were perceived to be at risk of possible ICC jurisdiction. Altogether, nine individuals were withdrawn at the time. This was done to continue US opposition to the ICC, but it was less 'radical' than other actions taken previously which showed that policy had to be adjusted to changing circumstances.

Additional Measures

Since the UN resolutions only protected US personnel acting as part of UN peacekeeping missions and only for a limited period of time, the United States sought to implement additional measures to exempt *all* its nationals from the ICC permanently. The two most important measures implemented by the Bush administration are bilateral immunity agreements (BIAs) and the American Servicemembers Protection Act (ASPA).

The bilateral so-called Article 98 agreements[47] between the United States and individual states stipulate that US personnel and nationals cannot be detained, arrested, or sent to the ICC. The original intent of Article 98 was to cover so-called Status of Force Agreements (SOFAs) between the United States and other countries (mainly NATO states) that give the United States primacy in exercising jurisdiction over US personnel acting on foreign soil. The Bush administration, however, used this provision to seek exemptions from a number of different states, exerting strong diplomatic and financial pressure if states refused to sign with "many of the states approached . . . too weak to resist."[48]

At the time of writing, 102 states have signed BIAs, including 52 ICC member states.[49] Larger and more influential states, such as Canada and states in the EU, have refused to sign BIAs, arguing that doing so would be inconsistent with their obligations as ICC state parties. The European Parliament even issued an official position in which it not only outlines its opposition to these agreements but also argues that "ratifying such an agreement is incompatible with membership of the EU."[50]

In addition, the Bush administration signed the American Servicemembers Protection Act (ASPA) into law[51], authorizing the United States to use "all means necessary, including military force, to rescue a US citizen taken into the court's custody." This provision led the ASPA to be called "The Hague Invasion Act." It limits US cooperation with the ICC, including the ability to collaborate, extradite, support, fund, and share classified information. The ASPA also imposes prohibition of military aid to states parties of the ICC but allows waivers if it is in the US national interest, if states signed Article 98 agreements and also for NATO states and major NATO allies.

Changing US Perceptions

Since the ICC's first actions in 2004, however, the United States seems to have adopted a more pragmatic approach toward the court, and a shift is discernible from the initial firm opposition to a fresh assessment of the court.

One reason for this change in attitude is the admission by a number of influential US politicians that BIAs and the ASPA are actually harmful to US interests. Cuts in military assistance to countries that have not signed BIAs mean lost opportunities of military training provided by US troops aimed at strengthening US

links to other countries, particularly in its fight against terrorism abroad. The US Defense Department severely criticized the effects these measures have had on military operations and cooperation in strategically important regions (such as Latin America and Africa). In 2006, a US Army Commander argued that the restrictions placed on US assistance in such countries gave China the opportunity to fill a void and step up its efforts to gain influence.[52] Furthermore, Condoleezza Rice admitted that the Article 98 agreements are like "shooting ourselves in the foot." In September 2006, the US Congress passed an amendment that repeals the section of the ASPA that restricts international military education and training (IMET) funds to ICC states parties. By September 2008, the United States waived and retracted a large number of restrictions related to countries refusing to sign BIAs as well as all ASPA sanction provisions. The United States conceded that the policy of Article 98 restrictions had failed and needed to be eliminated "once and for all."[53]

US and ICC Action in Darfur

Contrary to its overall hostility towards the ICC in general, the United States demonstrated its support for ICC action in Darfur, Sudan, from the start. The United States actively engaged in drafting a UN resolution that was eventually put to a vote in March 2005. The United States did not veto this resolution (it abstained) and even declared to be prepared to assist the court if asked. This resolution is controversial, however, because no other nonstate party can be prosecuted without its consent by the ICC. The United States thus ensured that its own citizens continue to remain outside the court's jurisdiction. This was important not only from a practical point of view, but also meant that the United States was not seen as giving outright support for the ICC and as having abandoned its concerns regarding the court. The abstention can be seen as a trade off: the US did not want to legitimise the ICC by voting in favour of the resolution but because it had called the situation in Darfur 'genocide', it invoked an obligation to act under international law.

The administration also faced a lot of domestic pressures from its own ranks to act in Darfur. John Danforth, former ambassador to the UN, admitted that the Bush administration labelled the situation as genocide to please the Christian right ahead of the presidential elections. He said that "it was of great interest to Christian conservatives in the United States, a good part of President Bush's base and it was something that was of personal interest to him."[54]

This conflict between public diplomacy towards Darfur and the opposition against the ICC was politically unsustainable. By abstaining, the US could find a compromise that allowed it to maintain its opposition to the ICC while at the same time showing tacit support for the international rule of law against genocide. As Ralph argues, however, the way "the administration was able to use the Security Council referral process to negotiate exemptions for its own citizens suggests that US policy had not really shifted at all."[55]

A number of US officials acknowledged the role of the ICC in the conflict in Darfur. The State Department's chief lawyer, John Bellinger, conceded that the United States could not delegitimize a court that has more that 100 member states including a number of major US allies. He argued that even though the Bush administration would never allow US nationals to be tried by the ICC, "We do acknowledge that it has a role to play in the overall system of international justice."[56] In September 2006, Republican politicians John McCain and Bob Dole agreed that the ICC had jurisdiction to prosecute war crimes committed in Darfur, thereby sending a strong signal that US leaders accepted the existence of the ICC and are willing to prosecute high officials in office.[57]

Overall, it can be argued that the initial active opposition of the Bush administration gradually gave way to a more pragmatic approach toward the ICC as a working global governance institution for some of the most serious human rights abuses. This change was partly due to some vocal opponents (such as John Bolton in 2006) leaving the administration and also because of pragmatic considerations over time. Clint Williamson, ambassador for War Crimes Issues at the time, argued that there was a need to bridge the divide between the United States and its allies over the ICC: "so what has happened is, you have this quiet change. No statement that policy was changing, and certainly no admission that the initial approach to the ICC was in any way wrong. The change has been incremental. . . . What we have done is just implement this policy on the working levels."[58] The United States acknowledged that the ICC was an appropriate forum to try some of the most serious human rights abuses in certain cases. It also showed, however, that the US started to *use* the court to protect its national interests whenever it suited its policy agenda. The US used the resolution on Sudan to protect its own soldiers and also to appease the Christian right and other interest groups that wanted to see action in Darfur. Abstaining meant that the US could act without having to detract its public opposition to the court. This

demonstrates that national interests are not fixed, but in line with a constructivist approach can be seen as changing: once the Bush administration realised that the ICC could be used to protect its soldiers, it changed its rhetoric to suit its national interests.

The US maintained that it opposed the ICC because it had the potential to limit state sovereignty by enforcing universal values through an international institution that was unaccountable to the UN and also the US. Countermeasures such as the Article 98 agreements, however, started to prevent the US from exerting influence in strategically important states in its 'war on terror'. Rather than continuing its active opposition, the US found the ICC to be a useful element of 'coercive diplomacy'[59] against rogue states such as Sudan. The US could use the ICC as a tool without having to use military force to intervene in a situation it had labelled 'genocide'. As George argues: "In employing coercive diplomacy (…) one gives the adversary an opportunity to stop or back off before one resorts to military operations." and further, "coercive diplomacy is an attractive strategy insofar that it offers the possibility of achieving one's objectives in a crisis economically, with little or no bloodshed, fewer political and psychological costs, and often with less risk of unwanted escalation than does traditional military strategy." [60] This is an attractive strategy for a powerful state like the US that can influence a weaker state with relatively little costs and risks.

The Obama Administration's Approach

With Bush leaving the White House and Democratic president Barrack Obama taking office, it can be anticipated that the US policy toward the ICC will continue to be more cooperative and less hostile. It is still too early to be certain how the Obama administration will choose to relate to the court, but initial signs point to positive engagement. Obama outlined the strengthening of international institutions as one of his administration's foreign policy priorities which signals a rhetoric shift from Bush's unilateral policy making towards increased mutltilateralism.

Secretary of State Hillary Clinton laid out the Obama administration's approach by stating that "we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways to promote US interests by bringing war criminals to justice."[61] In contrast to the Bush's administration's unilateralist stance, the Obama administration seems to engage in a more multilateral approach toward international human rights in general. Susan E. Rice, US ambassador to the UN, stated that the United States is committed to ending violations of

international humanitarian law in conjunction with the UN and other international organizations. She also argued that the ICC "looks to become an important and credible instrument for trying to hold accountable the senior leadership responsible for atrocities committed in the Congo, Uganda, and Darfur."[62]

It is very likely that the United States will participate actively in the 2010 Review Conference, in which issues such as the definition of the crime of aggression will be negotiated. The United States can take part as a non-state party, although joining the ICC would give it even stronger leverage in the negotiations. The US sent a delegation to the ICC's Assembly of States Parties' meeting in November 2009 which was the first time that the US had attended a meeting of the ICC since 2001. At this stage, however, it is not realistic to expect the United States to ratify the ICC Statute, but it is likely that Obama will engage in first steps toward it—such as reinstating the US signature to be able to participate in and support the court's meetings and activities. Arguably, such action would not be a complete change from US policies toward the end of the Bush administration, but it would indicate a further movement toward improving its relationship with the court.

Conclusion

US actions in opposition to the ICC were to a large extent based on the understanding that human rights law enforcement can only be administered by sovereign states and not through a mechanism of global governance of justice. The United States is predominantly concerned about protecting its national interests and in maintaining its unique powerful position in international relations. Yet, the United States is inconsistent in its approach to international justice dispensed through international courts: it showed strong support for the *ad hoc* tribunals but engaged in hostile actions against the ICC. The United States opposes the ICC because it is an independent institution not controlled by the UN Security Council, which means that there is at least a theoretical possibility that the ICC can compromise US sovereignty on issues related to universally recognized human rights norms. The US changed its active opposition towards the court when it realised the utility of such an international regime for genocide and crimes against humanity that has been proven in practice. Thus resulting in the shift in the US' position and rearticulation of its stance towards the ICC that has been seen since Rome.

The initial actions taken in opposition to the ICC are problematic because other states are being prevented from cooperating and assisting the court in its operations. These actions were intended to intimidate the court's supporters with the aim of achieving further concessions and exclusions from the ICC's jurisdiction. They were also based on a belief that the United States could prevent the court from coming into being. So far, however, the ICC has proved to be too strong, which is due to the strong foundation on which the ICC is built. Since the end of World War II, a number of developments toward increased global governance of international criminal justice and international law have taken place. The *ad hoc* tribunals, for instance, were the last in a line of numerous changes in the way human rights are being enforced internationally. The ICC is the latest step toward internalizing enforcement of justice and human rights norms that are incorporated in international law. A large number of states see the ICC as a necessary global governance institution for the enforcement of such laws that includes enough safeguards to not erode state sovereignty dramatically. The ICC is only a court of last resort; it is aimed not at changing existing power relations and undermining the predominant position of the United States but at protecting human rights.

The fact that the United States abstained from the Security Council resolutions related to ICC action in Darfur is evidence that it is trying to find more practical ways to work with the court and its supporters (rather than continue its active opposition). The US government even started to cooperate with the ICC in calling the government of Sudan to enforce the ICC's arrest warrant and in acknowledging the ICC's role in the overall system of justice. This is an important step because in the world following September 11 it is necessary to be consistent with existing fundamental principles of the liberal democratic order, which includes multilateral action and recognizes the importance of universal principles, human rights, and international law. As David Held argues, "What is needed is a movement of global, not American or French or British, justice and legitimacy."[63]

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[1]Is a U.N. International Criminal Court in the U.S. National Interest?, *Subcommittee on International Operations of the Committee on Foreign Relations United States Senate*, 1998.

[2]103rd Congress. January 28, 1993.

[3]It is widely believed that the states voting against the Statute were the United States, China, Israel, Libya, Iraq, Yemen, and Qatar.

[4]Article 5 of the Statute also includes the crime of aggression, but the ICC can only exercise jurisdiction over aggression once a common definition has been agreed upon.
[5]For a discussion on "sovereignty as responsibility," see for instance Evans, G., and Sahnoun, M. 2002. The Responsibility to Protect. *Foreign Affairs*. 81(6): 99-110 and Joyner, C. Joyner, C. "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention," *Virginia Journal of International Law* vol. 47 (Winter 2007): 693-723.
[6]Mayerfeld, J. 2003. Who Shall be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights. *Human Rights Quarterly*. 25(1): 93-129.
[7]Adler, E. 1997. Seizing the Middle Ground: Constructivism and World Politics. *European Journal of International Relations*. 3(3): 319-363.
[8]For a more detailed exposition of constructivism in International Relations see for instance Fierke, K.M. 2007. Constructivism. In T. Dunne, M. Kurki, and S. Smith (Eds.), *International Relations Theories: Disciplines and Diversity*. 167-184. Oxford, New York: Oxford University Press.
[9]Such action would only be possible in accordance with the complementarity principle.
[10]Scheffer, D.J. 2002. Staying the Course with the International Criminal Court. *Cornell International Law Journal*. 35(1): 47-100.
[11] Leigh, M. 2001. The United States and the Statute of Rome. *American Journal of International Law*. 95(1): 124-131.
[12]Philippe Sands, P. 2005. *Lawless World: America and the Making and Breaking of Global Rules*. London: Penguin; Allen Lane.
[13]Genocide, crimes against humanity and war crimes are well established in international law. The US was concerned, however, about the possible addition of the crime of aggression within the Statute, for which there is no universally accepted definition. The elements of the crime of aggression and the possibility of including it in the ICC's subject matter jurisdiction will be negotiated during the Review Conference in 2010.
[14]Hafner, G., Boon, K., Rübesame, A., and Huston, J. 1999. A Response to the American View as Presented by Ruth Wedgwood. *European Journal of International Law*. 10(1): 108-123.
[15]Weller, M. 2002. Undoing the global constitution: UN Security Council action on the International Criminal Court. *International Affairs*. 78(4): 693-712.
[16]Lietzau, W.K. 2001. International Criminal Law After Rome: Concerns from a U.S. Military Perspective. *Law and Contemporary Problems*. 64(1): 119-140.
[17]Ralph, J. 2003. Between Cosmopolitan and American Democracy: Understanding US Opposition to the International Criminal Court. *International Relations*. 17(2): 195-212.
[18]The Security Council is not the only power to do so—states parties and the independent prosecutor can refer cases to the ICC too. The US was concerned about giving the prosecutor such independent powers, arguing that the prosecutor would be unaccountable and could abuse his/her position to launch politically motivated investigations against US citizens or soldiers. This charge is bogus, however, because the prosecutor can only initiate an investigation with authorisation from a pre-trial chamber of judges. Furthermore, the principle of complementarity means that the US would be given six months to pursue its own investigation and, if appropriate, prosecution. The ICC could only proceed after this period if the ICC judges decided that the US was wilfully obstructing justice (a very high threshold) and any indictment would also require confirmation by the pre-trial chamber. This system ensures that the prosecutor is accountable to the ICC and cannot usurp due process.
[19]Edgar, A.D. 2002. Peace, justice, and politics: The International Criminal Court, "new diplomacy", and the UN system. In A.F. Cooper, J. English, and R. Thakur (Eds.), *Enhancing global governance: Towards a new diplomacy?* 133-151. Tokyo; New York; Paris: United Nations University Press.
[20]Schabas, W.A. 2004. United States Hostility to the International Criminal Court: It's All About the Security Council. *European Journal of International Law*. 15(4): 701-720.
[21]Power, S. 2000. The United States and Genocide Law: A History of Ambivalence. In S.B. Sewall, and C. Kaysen (Eds.), *The United States and the International Criminal Court: National Security and International Law*. 165-175. London, Boulder, New York; Oxford: Rowman & Littlefield.
[22]Ralph, J. 2005. International Society, the International Criminal Court and American foreign policy. *Review of International Studies*. 31(1): 27-44.
[23]Scheffer, 2002.
[24]It is important to note that in the US system, a dedicated and ideological minority can block ratification of treaties of liberally minded executives in the Senate. This was for instance the case for Woodrow Wilson who faced opposition to the signing of the Covenant of the League of Nations in the Senate. Negotiations surrounding the creation of the ICC are a good example of a two-level game in which the Senate has considerable influence over the bargaining power of the executive branch in

international relations between states. For a detailed exposition of the interplay between domestic and international politics see for instance Putnam, R.D. 1988. Diplomacy and domestic politics: the logic of two-level games. *International Organization*. 42(3): 427-460.

[25]Wedgwood, R. 2001. The Irresolution of Rome. *Law and Contemporary Problems*. 64(1): 193-214.

[26]Smith, C.A., and Smith, H.M. 2009. Embedded Realpolitik? Reevaluating United States' Opposition to the International Criminal Court. In S.C. Roach (Ed.), *Governance, Order, and the International Criminal Court - Between Realpolitik and a Cosmopolitan Court.* 29 - 53. Oxford: Oxford University Press.

[27]Scheffer, D.J. 2003. Restoring U.S. engagement with the International Criminal Court. *Wisconsin International Law Journal*. 21(3): 599-609.

[28]Statement by the Bill Clinton: Signature of the International Criminal Court Treaty, 31 December 2000.

[29]Bolton, J.R. 2001. The Risks and Weaknesses of the International Criminal Court from America's Perspective *Law and Contemporary Problems*. 64(1): 167-180.

[30]Scheffer, 2002.

[31]According to Article 18 of the Vienna Convention on the Law of Treaties, a signatory to a treaty is "obliged to refrain from acts which would defeat the object and the purpose" of the treaty. The Bush administration therefore had to formally un-sign the Rome Statute in order to be able to take action that effectively undermined the functioning of the ICC.

[32]Inside the Beltway, *The Washington Times*., 7 March 2005.

[33]Bolton, J.R. Unsign That Treaty, *Washington Post*. 4 January 2001.

[34]Daalder, I.H., and Lindsay, J.M. 2003. Bush's Foreign Policy Revolution. In F.I. Greenstein (Ed.), *The George W. Bush Presidency: An Early Assessment*. 100-137. Baltimore: John Hopkins University Press.

[35]Rice, C. 2000. Campaign 2000: Promoting the National Interest. *Foreign Affairs*. 79(1).

[36]Daalder, and Lindsay, 2003.

[37]Grossman, M. 2002. American Foreign Policy and the International Criminal Court, *Remarks to the Center for Strategic and International Studies*. Washington, D.C.

[38]Congressional Letter to President George W. Bush, 22 May 2002, signed by 44 Democrats and 1 Republican, which is further evidence of the division between realist and liberal foreign policy approaches (unilateral focus on national interests vs. multilateral engagement with international institutions)

[39]Declaration by the Presidency on behalf of the European Union on the position of the U.S. towards the International Criminal Court, 13 May 2002.

[40] Record of 4563rd Security Council Meeting, 30 June 2002.

[41]Resolution 1487 (2003) was adopted with twelve votes in favor and three abstentions—from Germany, France, and the Syrian Arab Republic.

[42]Secretary-General's press encounter upon arrival at UNHQ (unofficial transcript), 17 June 2004.

[43]Boucher, R. State Department Noon Briefing, June 23, 2004.

[44]Richter, P. Iraq Prison Abuse Undermines U.S. Hope for War Crimes Waiver, *LA Times*, 23 June 2004.

[45]Boucher, 2004

[46]Aita, J. (23 June 2004). U.S. Drops Effort to Secure ICC Immunity for Peacekeepers, *USINFO - The United States Department of State*.

[47]The United States claims that these agreements are in line with Article 98(2) of the ICC's Statute, which states that "the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements."

[48]McGoldrick, D. 2004. Political and Legal Reponses to the ICC. In D. McGoldrick, P. Rowe, and E. Donnelly (Eds.), *The Permanent International Criminal Court: Legal and Policy Issues*. 389-449. Oxford; Portland: Hart Publishing.

[49]See www.amicc.org.

[50]European Parliament resolution on the International Criminal Court (ICC), 2002.

[51]The ASPA was already proposed in 2000, but only a heavily modified version that included a number of exemptions allowing for presidential discretion was eventually adopted in August 2002.

[52]Posture Statement of General Bantz J. Craddock, United States Army Commander, *Senate Armed Services Committee, 14 March 2006*.

[53]Foreign Assistance in the Americas, *House Foreign Affairs Subcommittee on the Western Hemisphere*, 16 September 2008.

[54]Panorama: "Never Again", Interview with John Danforth, BBC One, 3 July 2005.

[55]Ralph, J.G. 2009. Anarchy is What Criminal Lawyers and other Actors Make of it: International Criminal Justice as an Institution of International and World Society In S.C. Roach (Ed.), *Governance, Order, and the International Criminal Court - Between Realpolitik and a Cosmopolitan Court.* 133 - 153. Oxford: Oxford University Press.
[56]Bravin, J. US Warms to Hague Tribunal, *The Wall Street Journal*, 14 June 2006.
[57]McCain, J., and Dole, B. Rescue Darfur Now, *The Washington Post*, 10 September 2006.
[58]Reassessing the International Criminal Court: Ten Years Past Rome. Washington: The Century Foundation, 13 January 2009.
[59]For an in-depth account of the idea and use of coercive diplomacy, see George, A.L. (1991). *Forceful persuasion: Coercive diplomacy as an alternative to war*. Washington United States Institute of Peace Press
[60]Ibid.
[61]Clinton, H.R. 2009. Questions for the Record, Senator John Kerry: Senate Foreign Relations Committee.
[62]Rice, S.E. 2009. Statement by Ambassador Susan E. Rice on Respect for International Humanitarian Law, in the Security Council.
[63]Held, D. 2005. Globalization, International Law and Human Rights, *Human Rights Institute Research Papers*: University of Connecticut.